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# Supreme Court of the United States

October Term, 1974

CASPAR WEINBERGER, SECRETARY OF HEALTH, EDUCATION AND WELFARE, *Petitioner*,

*v.*

GEORGE H. ELDRIDGE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH DISTRICT

## BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, AND FOR THE PLAINTIFFS IN GREEN, ET AL. v. WEINBERGER, ET AL. (D. D.C. NO. 2219-73) AS AMICI CURIAE

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This brief *amici curiae*, in support of the position of George H. Eldridge, is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and the plaintiffs in *Green, et al.* v. *Weinberger, et al.* (D. D.C. No. 2219-73), with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

## INTEREST OF THE AMICI CURIAE

The AFL-CIO is a federation of 110 national and international unions having a total membership of approximately 13,500,000 working men and women.

The question in the instant case is whether an injured

working man or woman receiving Social Security disability benefits can have the payments he or she is receiving cut off without an evidentiary prior hearing even though one is requested.

The individual members of the AFL-CIO constitute the largest single class of beneficiaries of the Social Security disability system. The nature of the procedures utilized in that system is therefore a major concern of the Federation.

The plaintiffs in *Green et al.* v. *Weinberger et al.* (D. D.C. No. 2219-73) are Rufus Green, Billy Joe Lambert, Patsie Lambert, and the Lambert's minor children, Ronda, Leitha, Jeanette, and Mary Ann. (In the Social Security disability program, when a disabled worker's benefits are terminated, the benefits paid directly to his dependent children are cut off at the same time.) The *Green* case involves the same question presented in the instant case. *Green* is a class action and the class has been certified by the district court as "those individuals whose [Social Security disability] benefits have been, are, or may be terminated by the Secretary." (Memorandum and Order, July 29, 1974.) All proceedings in *Green* have been stayed pending the resolution of the instant case by this Court.

In *Green*, factual material as to how the present procedures work, relevant to both that case and this, has been obtained through the discovery process. That material is set out in the Appendix to this brief (at pp. 1a-5a *infra*). It is to bring the Court's attention to this additional information, and to present argument in support of the position of George H. Eldridge, that this brief *amici curiae* is filed.



## ARGUMENT

### I. The Limits of the Controversy

In *Richardson* v. *Wright* 405 U.S. 208, 209 (1972) this Court deferred resolving the question of whether Social Security disability benefits may constitutionally be cut off without an evidentiary prior hearing:

> "Shortly before oral argument, we were advised that the Secretary had adopted new regulations, effective December 27, 1971, governing the procedures to be followed by the Social Security Administration in determining whether to suspend or terminate disability benefits * * *. In light of that development, we believe that the appropriate course is to withhold judicial action pending reprocessing, under the new regulations, of the determinations here in dispute * * *. In the context of a comprehensive complex administrative program, the administrative process must have a reasonable opportunity to evolve procedures to meet needs as they arise."

After three years of experience under the new "paper hearing" procedures (*Richardson*, 405 U.S. at 214 (Brennan, J. dissenting)) evolved by the Secretary while the *Richardson* case was pending in this Court, the question reserved in that case is ripe for disposition. The facts as to how that system works are in and a verdict can now be rendered.

At the outset we identify in some detail what an affirmance of the court below would, and would not, mean.

First, affirmance would not require the development of new hearing procedures. The Social Security disability system already provides a *post termination* evidentiary hearing for disabled workers who dispute the cut off of their

benefits. In terms of content, that hearing affords disability recipients the "minimal procedural safeguards • • • demanded by rudimentary due process." (*Goldberg* v. *Kelly*, 397 U.S. 254, 267) (*viz.*, a meaningful opportunity to obtain representation and gather evidence, an opportunity to appear personally, offer evidence, confront and cross-examine witnesses, and a decision by an impartial decision-maker based solely upon evidence adduced at the hearing (see *id.* at 267-271)). *Goldberg* itself makes clear that such a hearing "need not take the form of a judicial or quasi-judicial trial" (*id.* at 267), with the latter's attendant time consuming formalities such as adherence to the rules of evidence, and the prohibition of hearsay, etc. Indeed, the Court has underlined this precise point in the Social Security disability context. (See *Richardson* v. *Perales*, 402 U.S. 389.) Thus, here, as in *Goldberg*, the dispute is over the *timing* of the evidentiary hearing, not its content.

Second, affirmance would not require an evidentiary hearing in every case. At the present time such hearings are accorded only in disputed cases and not in those in which the recipient accepts the Secretary's "paper hearing" administrative decision. The results of what can aptly be termed a laboratory experiment in an analogous context demonstrate that moving the evidentiary hearing from the post to the pre-termination stage does not increase the number of recipients requesting such hearings. In *Hiatt* v. *Indiana Employment Security Division*, 347 F. Supp. 218 (N.D. Ind) (three-judge court), vacated and remanded for consideration of possible mootness, *sub. nom., Indiana Employment Security Division* v. *Burney*, 409 U.S. 540, 541-542, the district court's order



requiring Indiana to conduct evidentiary prior hearings was in effect from October 27, 1971 until February 21, 1973, the date it was vacated by this Court. Comparing the period January-March 1971 and January-March 1972, there was an 8% decrease (from 829 requests to 764) in the number of recipients seeking a hearing.[1] Moreover, utilizing the same periods of comparison, the percentage of hearings at which the recipients prevailed increased during the time in which the district court's order was in effect.[2]

The Secretary states that the interests to be assessed in determining when an evidentiary prior hearing is constitutionally required are:

> "First, the nature of the property • • • interest of which a person is assertedly being deprived • • •; second, the risk of an erroneous deprivation of such interest through the procedures used • • •; and third, the administrative burdens and costs that particular

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[1] Compare [Jan.-Mar. 1972] U.S. Dept. of Labor, Unemployment Insurance Statistics [U.I. Stats.] Table 18, p. 10 with [Jan.-Mar. 1971] U.I. Stats. Table 18, p. 14.

The Secretary claims that in the welfare system, the number of terminated recipients seeking hearings "altered significantly" two years after *Goldberg* was decided, "jumping" from 1.2% to 2%, a differential of 1.67 (Sec. Br. p. 52). Assuming the same rate of increase, which is unlikely given the unemployment compensation experience under the *Hiatt* decree, and using the most recent Social Security data (see App. pp. 1a-2a, *infra*), the number of hearings that would be required for the entire country would increase from 1,878 to 3,136, a far cry from the Secretary's spectre that affirmance would result in the holding of 18,370 evidentiary hearings a year. (Sec. Br. p. 52.)

[2] Compare [Jan.-Mar. 1972] U.I. Stats. Table 18, p. 10 (49.2% success factor) with [Jan.-Mar. 1971] U.I. Stats. Table 18, p. 14 (45% success factor).

procedural requirement would entail." (Sec. Br. p. 36.)

We agree. For, these are the very factors upon which the *Goldberg* Court predicated its conclusion that an evidentiary prior hearing is the pre-condition for a cut-off of welfare. The Court there recognized that the loss of welfare "may deprive an *eligible* recipient of the very means by which to live" (397 U.S. at 264; emphasis in original); that, in the absence of an evidentiary hearing the "welfare bureaucracy [has] difficulties in reaching correct decisions on eligibility" (*id.* at 264, n. 12); and that, given the risk of erroneous decisions, the needs of the recipient are not "outweighed by countervailing government interests in conserving fiscal and administrative resources" (*id.* at 265). As Mr. Justice White subsequently restated the lesson of *Goldberg:*

> "The greater the level of deprivation which may flow from a decision, the less one may tolerate the risk of a mistaken decision, cf. Morrissey v. Brewer [408 U.S. 471], and thus the Court in Goldberg, while maintaining that the pretermination hearing was in the nature of a probable cause determination, was less willing to allow a margin of error as to probable cause." (*Arnett* v. *Kennedy,* 416 U.S. 134, 201 (concurring and dissenting opinion).)

Thus the governing principles are well settled. The crux of the controversy here is whether the Secretary's soothing assurances that the "procedures now followed in terminating Social Security disability benefits are fair, and [that] they work" (Sec. Br. p. 55), prove out, or whether his arguments are nothing more than a carefully contrived illusion designed to create the appearance of a system that comports with the Constitution. As we now show, an



analysis of the interests identified by the Secretary leads, not to the conclusion he reached, but to the certainty that in this case, as in *Goldberg,* an evidentiary prior hearing is constitutionally required.

## II. The Risk of Error

**(A).** In *Fusari* v. *Steinberg,* —— U.S. ——, 43 U.S.L.Wk. 4121, the Court recently remanded a case challenging the cut-off of unemployment compensation without an evidentiary prior hearing to the district court for reconsideration of the operation of that termination procedure in light of intervening changes in state law. Mr. Justice Powell put forward two measures of the legality of a procedure in which the evidentiary hearing is deferred to the post-termination stage: "the reversal rate of appealed denials of benefits" (*id.* at 4122); and the "delay [in] obtaining administrative review" (*id.* at 4123). We therefore begin by applying that model to the Social Security disability termination system.

First, the present disability termination procedures are less accurate than deciding disputed cases by flipping a coin. In 1973, 58.6% of all appealed decisions terminating Social Security disability benefits were reversed following evidentiary hearings; in 1972 the reversal rate was 54.7%. (App. p. 2a *infra.*) (The figures for 1974 are not yet available.)

Indeed, the present procedures have turned out to be less effective than those in effect prior to the January, 1972 "reform" that prompted the *Richardson* Court to stay its hand to permit the Secretary to "evolve procedures to meet needs as they arise." (405 U.S. at 209.) For,

in 1971, 1970 and 1969, the reversal rates were 53.7%, 55.2% and 54.9% respectively. (App. p. 2a *infra.*)

The inadequacy of the present "paper" procedures is further confirmed by a comparison to the facts in *Goldberg* and in *Fusari.* In the former, the Court noted the "particularly telling" significance of the "welfare bureaucracy's difficulties in reaching correct decisions on eligibility." (397 U.S. at 264, n. 12.) There, the reversal rate was only 36%. (See *Kelly* v. *Wyman,* 294 F. Supp. 893, 907 (S.D. N.Y. 1968) (three-judge court).) And in *Fusari,* the Court found a reversal rate ranging from 19.4% to 26.1% to be "significant." (43 U.S.L.Wk. at 4122.)

Second, the disability system's lack of reliability is not alleviated by prompt post-termination hearings. And, the "rapidity of administrative review is a significant factor in assessing the sufficiency of the entire process." (*Fusari,* 43 U.S.L.Wk. at 4124.) Disabled workers who dispute their cut-offs must wait approximately 12-15 months for an evidentiary hearing. (Sec. Br. p. 35.) No benefits are paid during this period despite the fact that if a recipient is among the approximately 55% who are wrongfully cut-off he is so disabled that he is unable "to engage in *any* substantial gainful activity." (42 U.S.C. § 423(d)(1)(A); emphasis added.) In *Fusari,* a 126-day delay prompted the Court to characterize Connecticut's system of administrative appeal as "torpid," and to note that the "system often failed to deliver benefits in a timely manner." (43 U.S.L. Wk. at 4123.)

The Secretary contends evidentiary hearings do not "improve to any significant extent the already substantial reliability of the existing disability termination procedures." (Sec. Br. p. 44.) The claim that the present procedures produce accurate results is, in fact, the dominant theme of that brief. (See Sec. Br. pp. 10, 12, 13, 27-32, 34-36, 39-45, 55.) In *Fusari* the Court looked to "the reversal rate of appealed decisions" as the measure of the unemployment compensation termination system's reliability. (42 U.S.L.Wk. at 4122.) We have followed the Court's lead. The Secretary has not, most probably because that reversal rate undermines his entire case. Since necessity is the mother of invention, he would substitute the "percent of the initial determination of cessation of disability [in] which post termination review results in a decision favorable to the worker." (Sec. Br. p. 32.) For, that approach enables him to claim that 85% of the 35,000 "paper hearing" cut-off decisions (26,000 of which are not appealed (75%)) are not reversed on appeal. (Sec. Br. p. 31.) But the inquiry the Secretary suggests is not germane to the issue in this case. As we have stressed, the Court is called upon to decide only whether those disabled workers who *request* an evidentiary hearing are to be granted that hearing at the pre-termination stage. (Pp. 3-4 *supra.*) Given that question, the only relevant bench-mark is the percentage of disabled workers who would not have been wrongfully cut off had they been accorded an evidentiary prior hearing upon request. In this case that percentage is approximately 55%.

The Secretary would also explain away the damning reversal rate just noted on the ground that the subsequent hearing occurs months after a cut-off, during which time "new evidence" may have appeared. (Sec. Br. pp. 12-13, 31-32, 45 & n. 50.) But the reversal rate in the disability system is not a function of the passage of time. The present procedures provide for a "paper hearing,"

then a paper reconsideration, then an appeal to an Administrative Law Judge who conducts an evidentiary hearing, and then a further appeal to an Appeals Council "which may review the record *de novo* and may receive additional evidence." (Sec. Br. pp. 30-31.) This final appeal, of course, occurs even longer after the initial cut-off than the evidentiary hearing, but the reversal rate at this stage is only 12% (Sec. Br. p. 31); a far cry from the approximately 55% reversal rate at the prior appellate step.[3]

The comparison between these two reversal rates does more than discredit the Secretary's attempt to put the present system in a better light than the facts will permit. It is an independent verification of the intuitively obvious proposition, central to anglo-american jurisprudence, that an evidentiary hearing is far more likely than the available alternatives to produce a determination of contested factual issues that will stand up on review. We now turn to the reasons why this is so.

**(B).** The questions involved in Social Security disability cases are simply too complex to be correctly resolved entirely on paper. They involve such subjective considerations as failure to cooperate with Social Security authorities (20 CFR § 404.1539(c)), whether a recipient "has regained his ability to engage in substantial gainful activity • • • as demonstrated by work activity" (20 CFR § 404.1539(a)(2)), or, whether disability has ceased as evidenced by medical recovery (20 CFR § 404.1539(a)(1)). As the Secretary himself states, these decisions implicate "inherently dynamic factual conditions." (Sec. Br. p. 25.)

[3] It cannot be mere happenstance that the only reversal rate not included in the Secretary's Brief is the reversal rate at the evidentiary hearing. (See Sec. Br. p. 31.)



A finding that a disabled worker "has regained his ability to engage in substantial gainful activity as demonstrated by work activity" depends on the nature of the work performed, the adequacy of the performance, and the special conditions, if any, of the employment, as well as an evaluation of the time spent and the amount of money earned by the recipient. (20 CFR §§ 404.1532-404.1534.)

The decision on whether disability has ceased as evidenced by medical recovery turns on such elements as:

> "(1) the objective medical facts, which are the clinical findings of treating or examining physicians divorced from their expert judgments or opinion as to the significance of these clinical findings, (2) the diagnoses, and expert medical opinions of the treating and examining physicians on subsidiary questions of fact, (3) the subjective evidence of pain and disability testified to by Claimant, and corroborated by his wife and his neighbors, (4) Claimant's educational background, work history, and present age • • •. The ultimate fact in issue; that is, Claimant's ability or inability to engage in any substantial gainful activity, is not to be resolved, however, solely on the basis of medical opinion evidence as to this ultimate fact • • •. It then becomes necessary to consider subjective testimoney to determine accurately the effect of these impairments upon the Claimant. Such evidence may be entitled to great weight on the matter of disability • • •. Even though severe physical limitation be established, it is still necessary in applying the legal standard to relate this standard to the Claimant's work history and educational background • • •. Indeed, the Secretary's regulations • • • expressly provide: "Conditions which fall short of the level of severity indicated must

also be evaluated in terms of whether they do in fact prevent the individual from engaging in any substantial gainful activity." (*Underwood* v. *Ribicoff*, 298 F.2d 850, 851-852 (4th Circuit, 1962.)[4]

Congress has recognized the difficulty of making disability determinations:

> "[E]ach substantive determination of disability calls for an individual application of a set of necessarily complex medical and vocational facts to the definition of disability which is in the Social Security Act, the precedents and interpretative guides for which have been of an evolutionary rather than an established nature * * *." (*Administration of Social Security Disability Insurance Program*, Prelim. Rep. to the House Comm. on Ways & Means by the Subcomm. on the Administration of the Social Security Laws, p. 5 (March 1, 1960).)

Indeed, during the initial debate in Congress on the creation of the disability program, the American Medical Association labeled disability an "elusive concept." (Hearings on H.R. 7225 Before the Senate Comm. on Finance,

[4] The other Circuits share the Fourth Circuit's view that disability decisions turn on subjective considerations that are best understood on the basis of the testimony of witnesses at an evidentiary hearing:

> "The Act and the regulations promulgated by the Secretary pursuant to it require a subjective determination of the claimed disability. Symptoms which are real to the claimant, although unaccompanied by objective medical data, may support a claim for disability benefits." (*Bittel* v. *Richardson*, 441 F. 2d 1193, 1195 (3rd Cir., 1971).)
>
> "[E]ven pain unaccompanied by objectively observable symptoms which is nevertheless real to the sufferer and so intense as to be disabling will support a claim for disability benefits." (*Ber* v. *Celebrezze*, 332 F. 2d 293, 299 (2d Cir., 1964).)



84th Cong., 2d Sess., pp. 833-836 (1956).) For, as the American Academy of General Practice testified: "unfortunately, medical science has not reached the point of being able to unerringly state whether or not a man is totally and permanently disabled." (*Id.* at 358.) In *Perales*, 402 U.S. at 399, this Court recognized that in Social Security disability cases, it is "not uncommon" for "triers of fact" to be faced with "conflicting medical evidence."[5]

In short, disability cases, perhaps even more than welfare cases, turn on difficult and complex resolutions of hotly contested factual questions. The evidence underlying disability decisions is precisely that relied upon in a personal injury trial. And as our crowded court calendars attest, this is classic grist for the adversary mill. Since "rules of procedure are often shaped by the risk of making an erroneous determination (See In re Winship, 397 U.S. 358, 368 (1970) (Harlan, J. concurring)" (*Arnett*, 416 U.S. at 201 (White, J. concurring and dissenting)), evidentiary prior hearings are required in the Social Security disability system no less than in the welfare system.

[5] The Secretary's assertions to the contrary notwithstanding (Sec. Br. pp. 40-41), *Perales* does not sanction the "paper hearing" procedure. In that case, the Court did not address the timing of the Social Security disability "evidentiary hearing," which is the issue here. Rather, it clarified the content of that term by ruling that hearsay evidence is admissible. And, in so doing, the Court endorsed the principle, stressed in *Goldberg*, 397 U.S. at 269-270, that the opportunity to confront and cross-examine adverse witnesses is a basic procedural safeguard. Seven separate passages of the Court's opinion make it clear that the Social Security disability evidentiary hearing provides a full opportunity to subpoena, confront and cross-examine all witnesses. (See 402 U.S. at 397-410.)

## III. The Harm Caused

The Secretary argues that the economic predicament facing a disability recipient wrongfully cut-off does not approach that of the welfare recipient in *Goldberg*. (Sec. Br. pp. 37-39.) To be sure, because Congress chose to preserve "the self reliance, the dignity and the self-respect of disabled workers" (H.R. Rep. No. 1189, 84th Cong., 1st Sess., pp. 4-5 (1955)), it did not establish a means test: "From the outset, social security • • • disability • • • benefits have been 'afforded as a matter of right, related to past participation in the productive processes of the country.' Final Report of the Advisory Council on Social Security 17 (1938)." (*Weinberger* v. *Wiesenfeld*, —— U.S. ——, 43 U.S.L.Wk. 4393, 4397.) But "the • • • system is structured to provide benefits in part according to presumed need." *(Id.)* As the Secretary recognizes, "Most people who get a social security check depend on it for the necessities of life." (Pet., App. C., p. 20A.) Congress' presumption, and the Secretary's acknowledgement, are born out by the facts.

Workers who do the hard and dirty jobs and who are typically among the lowest paid are most likely to draw upon the Social Security disability program. The most accurate, complete and recent data the Secretary has been able to provide is that:

> "The 1965 statistics indicate that the mean income of the family unit of a disabled worker was $3,803.00. The median income for a similar grouping was $2,-836.00. The mean financial assets of disabled workers' family units was $4,862.00; the median for a similar group was $940.00. For purposes of the study, financial assets were defined as liquid assets, such as cash



> in banks, credit unions, and similar institutions, and United States Savings Bonds at face value; the market value of stocks, bonds or shares in mutual funds; and amounts due from loans to other people." (App. pp. 5a-6a *infra*.)[6]

In that year the official government poverty line was an income of $3,223 a year. (U.S. Bureau of Census, Current Population Reports, Series P-60, No. 98, p. 160, Table A-1, 1975.) And, other studies indicate that 90% of severely disabled workers have no earnings whatsoever:

> "Few disabled workers increase their incomes through earnings. Only ten percent, about 127,000 of almost 1.3 million, report any earnings at all • • •. For those with earnings, the annual median is $655; about half earn under $600 a year. Ninety percent of the total beneficiary population earn nothing." (Franklin, "Earnings of the Disabled-Worker Beneficiaries," *Social Security Bulletin*, p. 18 (June 1974).)[7]

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[6] This data, compiled in 1966, is the most current available. (App. p. 5a.) In light of the recent inflationary spiral there is every reason to believe that the comparative position of disabled workers is worse today than at that time.

[7] Despite the fact that a social security disability recipient may be without any other assets, he is ordinarily unable to supplement his disability benefits with benefits from Supplemental Security Income (SSI), the welfare program for the disabled. The average monthly Social Security disability payment is $205.68; in Virginia where Mr. Eldridge resides, the average is $199.55. (OASDI Monthly Cash Benefits by State and County of Residence, Social Security Administration, Department of Health, Education and Welfare, Table RS: 52.11 (December, 1974).) Sixty-six and two-thirds percent of Social Security disability recipients receive monthly benefits in excess of $175. *(Id.)* Unless a state supplements federal SSI benefits, a disabled worker with a monthly income over $166 is automatically ineligible for SSI. (42 U.S.C. §§ 1382(a)(1)(A), 1382a(b)(2).) Virginia, like the majority of

Moreover, since the median liquid assets available to disabled workers is $940, and since there is a mandatory five month waiting period prior to initial receipt of benefits (42 U.S.C. § 423 (c)) it is all but inconceivable that the typical recipient would have assets to carry him through the 12-15 month period during which he must normally wait for a post-termination evidentiary hearing.

The Report of the Advisory Council on Social Security, H.R. Doc. No. 9290, 92d Cong. 1st Sess., p. 28, 48-49, speaks to the important role played by social security benefits—and especially disability benefits—in meeting the most basic needs:

> "Disability generally occurs without warning and in many cases deprives workers of what otherwise would be the most productive of their working years. Few workers have sufficient resources to sustain them throughout a long-term disability and, for most, social security benefits offer the only substitute for the earnings that have been lost • • •.
>
> • • • •
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> "[The Act's] objectives are to assure that when earnings from work are cut off because of the retirement, disability, or death of the family breadwinner, each covered worker and his family will have a continuing source of income related to his previous earnings and to assure that they can get this protection with dignity • • •."

states does not supplement federal SSI benefits. (Supplemental Security Income for the Aged, Blind and Disabled, Summary of State SSI and Medicaid decisions, Department of Health, Education and Welfare, Social Security Administration, § 12999 Appendices I-X (rev. Feb. 4, 1975).) And, in those states that supplement the federal SSI grant, the average amount of the supplement is between $10 and $25. *(Id.)*



But, for the disabled worker whose benefits have been wrongfully cut off there is no "prospect for some form of support during the period between pretermination and final hearing on appeal • • •." (*Arnett*, 416 U.S. at 201, (White, J., concurring and dissenting).) He can not "secure a job in the private sector," and he is categorically "[in]eligible for welfare benefits." (*Id.* at 169 (Powell, J., concurring).)

As a result of his disability, the recipient is, by definition, unable to "engage in *any* substantial gainful activity." (42 U.S.C. § 423 (d)(1)(A); emphasis added.) And, since the Secretary employs the identical definition of disability in both the Title II Social Security disability program and in the companion welfare system for the disabled, Supplemental Security Income ("SSI"), terminated disability recipients are automatically barred from going on welfare.[8]

Thus, it is simply not true that a recipient " 'may be able to secure a job' [or] 'will be eligible for welfare benefits.' " (Cf. Sec. Br. p. 32.)[9] Here, as in *Goldberg*, "termination of aid pending resolution of a controversy over

[8] Compare 42 U.S.C. § 423(d)(1) with 42 U.S.C. § 1382 c (a)(3).

[9] Nor is general assistance ("country poor relief") a feasible alternative. Since that form of welfare is locally operated and financed there are many political subdivisions which do not have such a program. Where it does exist it is completely inadequate to provide even a bare subsistence level of support. The average payment is $11.00 per week. (See, President's Commission on Income Maintenance Programs, Background Papers, 279 (1969).) Consequently in *Goldberg* the possibility of local general assistance did not prevent the Court from requiring evidentiary prior hearings.

The Secretary relies upon Mr. Eldridge's assertion that he could "get by" without his benefits as evidence of another unspecified source of income. (Sec. Br. p. 39.) When placed in context, the statement simply shows Eldridge's understandable frustration with

eligibility may deprive an *eligible* recipient of the very means by which to live while he waits." (397 U.S. at 264; emphasis in original.)

**IV. The Government's Interest**

This case is wholly distinct from the line of cases stemming from *Fuentes* v. *Shevin*, 407 U.S. 67,[10] involving the competing due process claims of two private parties to the same private property. The dilemma facing the Court there was that a holding that one private party to the controversy had a right to a prior hearing had the inevitable result of depriving the other of his right to a prior hearing. That dilemma is not present here because the social security disability program is wholly funded by the federal government from social security taxes.

This proceeding is equally distinct from the prior hearing cases in which non-pecuniary government interests were present: See *Arnett*, 416 U.S. at 168 ("Prolonged retention

a procedure that had twice denied him benefits for prolonged periods pending his success at evidentiary hearings:

> "The people at the Disability Section in Richmond have never made a yes decision in my case, I have always had to have a hearing in order to get the decision made properly. Even at the last hearing that was held in my case I had to employ an attorney, and the Examiner made his decision wholly in my favor and stated in his decision for my checks to continue without interception [sic]. So go ahead and make your own decision in the case, I know I'm not able to work, if I ever get able to work again I will, I will get by someway without the Social Security even though I paid into it while I was able to work." (A. 13-14.)

[10] See also *Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600, 604; *Dillard* v. *Industrial Commission of Virginia*, 416 U.S. 783, 798; *North Virginia Finishing Inc.* v. *Di-Chen, Inc.*, —— U.S. —— 43 U.S.L. Wk. 4192.



of a disruptive * * * employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency." (Powell, J. concurring in part)); *Goss* v. *Lopez*, —— U.S. ——, 43 U.S.L.Wk. 4179, 4185 ("The difficulty is that our schools are vast and complex. Some modicum of discipline and order is essential if the educational function is to be performed. Events calling for discipline are frequent occurrences and sometimes require immediate, effective action"). Indeed, *Goldberg* itself distinguished the situation that eventually came before the Court in *Arnett*—discharge from public employment. (See 397 U.S. at 264.)

For, the sole government interest advanced here is one of increased administrative cost. Thus this case is like *Goldberg*. And, by any fair reckoning these costs are substantially less than those entailed by *Goldberg* in the far larger welfare programs. *Goldberg* recognized that the "benefits paid to ineligible [welfare] recipients pending decisions at the hearing probably cannot be recouped since these recipients are likely to be judgment proof." (397 U.S. at 266.) In contrast the Secretary concedes that substantial recoupment is accomplished in the Social Security disability program. (Sec. Br., App.C, p. 66a.)[11] Further,

[11] The lower court pointed out:

> "[T]he Secretary assumes that all of those demanding hearings will lose, and that the Secretary will be unable to recover any of the benefits paid to beneficiaries pending the hearing. Both of these assumption are unwarranted. Not only do a substantial number of persons demanding a hearing prevail [nearly twice the percentage in welfare] but the Secretary is directed to require a refund from the beneficiary or decrease future benefits in the case of an overpayment. 20 C.F.R. §§ 404.501-404.502." (Pet. App. B, p. 15A.)

unlike welfare, the Social Security statute provides for a two month "grace period" after a recipient's "disability ceases" during which time benefits continued to be paid. (42 U.S.C. § 423(a).) Thus if hearings were held within this period, there would be no overpayments at all.

The Secretary's estimate of the administrative costs—"as much as $25,000,000 involved annually" (Sec. Br. p. 14)—is grossly inflated.[12] The reasons given for this "estimate" simply do not withstand scrutiny.

The Secretary contends that substantial delays and costs would result because a pre-termination hearing would require a "fundamental restructuring of the existing institutions." (Sec. Br. at 47.) He opines that hearings would either have to be held by state agencies "not equipped to hold evidentiary hearings" or at SSA district offices that do not have staff trained for that purpose. (Sec. Br. pp. 47-49.) A more simple and obvious solution, that apparently escaped the Secretary, was pointed out by the court below:

> "[T]here are currently post-termination hearing procedures provided • • • and the Secretary could comply with the requirement for pre-termination hearings by merely changing the timing of the hearings. This was done in the case of welfare recipients after Goldberg, and there has been no showing that it could not be done here." (Pet. App. B, p. 14A.)

The Secretary's original cost estimates were based on the assumption that if an opportunity for an evidentiary prior hearing were provided, one would have to be held in each termination case. The obvious fallacy of this posi-

[12] The Secretary's figures below varied at different stages of the proceedings between $16 million and $45 million. (See Pet. App. B, p. 14A.)



tion was pointed out by the district court. (Pet. App. B, pp. 14A-15A.) The Secretary contends at this juncture that 11,000 additional hearings will be required, but even this reduced figure is not a fair extrapolation from the known facts.

The Secretary assumes that if the decision below is affirmed two evidentiary hearings—pre-termination and post termination—would have to be held. But, as the Court pointed out in *Goldberg*, "[d]ue process does not, of course, require two hearings." (397 U.S. at 267.) The Secretary also assumes that even if the percentage of disputed cases does not increase (25%), the absolute number will, based on "past experience." (Sec. Br., App. C, p. 63A.) Without providing any substantiation, he projects that the number of cut-offs will increase from 35,000 in 1973 (Sec. Br. p. 31) to 44,000 (Sec. Br., App. C, p. 63A). But past experience proves quite the contrary. Since 1970 the number of terminated disabled workers requesting an evidentiary hearing has never exceeded 6%. (App. pp. 1a-2a *infra*.) And the number of terminations has steadily *declined*. (1970—48,918 terminated, 1,962 evidentiary hearings held; 1971—37, 538 and 1,861; 1972—36,589 and 2,034; 1973—33,598 and 1,878 (App. pp. 1a-2a, *infra*).)[13]

The Secretary's cost figures are also predicated upon the present 10-11 month waiting period for an evidentiary

[13] In addition, in making his projection the Secretary has ignored the reconsideration stage. If that facet of the system were retained, past experience indicates that 40% of disputed cut-off cases would be resolved in favor of disabled workers without an evidentiary hearing. (Sec. Br., App. A, pp. 10A, 11A, n. 21). These recipients should have been eliminated from the pool for whom evidentiary hearings would have to be provided.

hearing. (Sec. Br., p. 51, App. C, p. 66A.) The Court noted in *Goldberg* that:

> "the State is not without weapons to minimize • • • increased costs. Much of the drain on fiscal and administrative resources can be reduced by developing procedures for prompt pre-termination hearings and by skillful use of personnel and facilities." (397 U.S. at 266.)

The experience following this Court's decision in *California Human Resources Dept.* v. *Java*, 402 U.S. 121, in which unemployment compensation benefits were required to be paid pending an evidentiary hearing on an employer's appeal, is instructive. Prior to *Java*, the *median* period for an unemployment compensation evidentiary hearing in California was 49 days in 1968, and 40.5 days in 1969. (*Java*, 402 U.S. at 128 n. 6). But in 1973, roughly 60% of the appeals decisions were rendered in 30 days or less. ([March—April, 1974] U.I. Stats., Table 17b, p. 28.) There is no apparent reason why a similar reduction could not be accomplished here.

In sum, it continues to be true, in the district court's words, that:

> "the assumptions and omissions in the Secretary's analysis of the cost of requiring pre-termination hearings in disability cases make [his] figure almost meaningless. It is perhaps true that some additional cost will be entailed by the government in providing pre-termination hearings to those disability recipients who request it, but it does not appear that the government's interest in minimizing costs and maximizing administrative efficiency are of such overwhelming significance in this case as to outweigh the needs of the individual not to be erroneously found to be able to engage in substantial gainful activity." (Pet. App. B, pp. 14A-15A.)



Finally, in assessing costs, the Secretary ignores the other side of the ledger,—"[t]he same governmental interests that counsel the provision of [disability benefits], counsel as well its uninterrupted provision to those eligible to receive it." (Cf., *Goldberg*, supra 397 U.S. at 265.) The present "paper hearing" procedure results in the wrongful denial of benefits to the majority of disabled workers who challenge their cut-offs. Yet "one of the principle goals of the Administration is to see that disability beneficiaries get their checks • • • at the time they expect them, and that the right check continues to be sent • • • *on time as long as he continues to be eligible for such benefits.*" (HEW Disability Insurance State Manual, reprinted in Pet. App. C, pp. 20A-21A; emphasis in original.) These recipients are men and women who, before they became totally disabled, paid into the Social Security system so that, should they be struck with a disability and no longer able to work, they would have some means of support. Here, as in *Goldberg*, "pre-termination evidentiary hearings are indispensable to that end." (397 U.S. at 265.)

## CONCLUSION

For the above stated reasons, the judgment below should be affirmed.

Respectfully Submitted

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May, 1975



## APPENDIX

### IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

| | |
|---|---|
| Rufus Green, Billy Joe Lambert, Patsie Lambert, Ronda Lambert, Leitha Lambert, Jeanette Lambert, and Mary Ann Lambert, through their father and next friend, Billy Joe Lambert, individually and on behalf of all others similarly situated,<br>*Plaintiffs,*<br>vs.<br>Caspar W. Weinberger, individually and in his capacity as Secretary of the United States Department of Health, Education, and Welfare, The United States of America,<br>*Defendant.* | Civil Action No. 2219-73 |

### DEFENDANT'S ANSWERS TO PLAINTIFF'S FIRST INTERROGATORIES

• • • •

14. "Please state the number of times that payment of social security disability benefits were terminated pursuant to an initial determination (as defined in 20 C.F.R. § 404.-905) that disability had ceased:"

(a) For the calendar year 1969 — 41,895
(b) For the calendar year 1970 — 48,918
(c) For the calendar year 1971 — 37,585
(d) For the calendar year 1972 — 36,589
(e) For the calendar year 1973 — 33,595

• • • •

19. "Please state the number of times that after benefits

were terminated pursuant to an initial determination (as defined in 20 C.F.R. § 404.905) that disability had ceased and upon reconsideration this initial determination was upheld that the recipient involved requested and received a full evidentiary hearing:"

(a) For the calendar year 1969—1,819

(b) For the calendar year 1970—1,962

(c) For the calendar year 1971—1,861

(d) For the calendar year 1972—2,034

(e) For the calendar year 1973—1,878

20. "Please state the number of times and percentage of occurrence when the initial determination was reversed and benefits reinstated by the hearings referred to in Interrogatory #19:"

(a) For the calendar year 1969— 998—54.9%

(b) For the calendar year 1970—1,084—55.2%

(c) For the calendar year 1971— 999—53.7%

(d) For the calendar year 1972—1,113—54.7%

(e) For the calendar year 1973—1,101—58.6%

• • • •



January 28, 1975

Mr. Thomas Stout
Office of The General Counsel
Social Security Administration
Room 628
6401 Security Boulevard
Baltimore, Maryland 21235

Re: *Green, et al.*, v. *Weinberger, et a*
U.S. District Court for the
District of Columbia
Civil Action No. 2219-73

Dear Tom:

Confirming our telephone conversation earlier today, we would like to request the following information, if available, on the Social Security Disability Program:

1) the average and median income of Social Security disability recipients;

2) the average and median financial assets of Social Security disability recipients;

3) the average and median length of time between the filing of a reconsideration request and a decision thereon;

4) the average and median length of time between filing a request for a full administrative hearing and the decision thereon.

In answering these questions please utilize the most recent time period for which such information has been compiled.

Thank you very much for your cooperation.

Sincerely,
Stephen P. Berzon
Attorney for Plaintiffs

cc: Eric B. Marcy
Assistant U.S. Attorney

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
Office of The Secretary
Baltimore, Maryland 21235

March 7, 1975

Office of The
General Counsel
Telephone
301-594-7007

Mr. Stephen P. Berzon
Children's Defense Fund
1763 R. Street, N.W.
Washington, D.C. 20009

Re: Green, et al. v. Weinberger, et al.
(D. D.C., Civil No. 2219-73)
(Our ref: GC:SS:TStout)

Dear Mr. Berzon:

In response to your letter of January 28, 1975, the following information is submitted:

1. The mean length of time between the filing of a reconsideration request and a decision is 86 days. The median length of time between the filing of a reconsideration request and a decision is 68 days. This information is based upon a sample of recent reconsideration decisions. The information pertains to all types of Title II disability cases, including initial and cessation reconsiderations. Apparently, a substantial part of this time lapse involves preparation of notice of the decision. For example, in cases in which a denial is affirmed upon reconsideration, the State agency releases the notice of denial, not the Bureau of Disability Insurance. In this situation, which may more closely approximate the *Green* case, the mean and median time periods are 50 and 46 days, respectively.

2. We are advised that the mean length of time between filing of a request for a full administrative



hearing and a decision after hearing is 221 days. The equivalent median period is 211 days. This information is based upon decisions rendered for the period November 10, 1974, to December 7, 1974. Again, this information relates to all Title II disability hearings, including hearings regarding initial claims and cessation claims. Individuals who are currently requesting hearings may anticipate that a hearing will be held within 10 to 11 months.

3. With respect to your questions regarding the average and median income and average and median financial assets of social security disability recipients, the available information is somewhat dated and is not precisely responsive. Our most recent information was compiled in 1966 from a sample done in 1965. The statistical personnel can give no opinion concerning the current utility of the information which is clearly very old. In addition, the statistical information compiled related to income and assets of family units, not individual recipients. The 1965 statistics indicate that the mean income of the family unit of a disabled worker was $3,803.00. The median income for a similar grouping was $2,836.00. The mean financial assets of disabled workers' family units was $4,862.00; the median for a similar group was $940.00. For purposes of the study, financial assets were defined as liquid assets, such as cash in banks, credit unions, and similar institutions, and United States Savings Bonds at face value; the market value of stocks, bonds or shares in mutual funds; and amounts due from loans to other people.

We hope that this information will be satisfactory. If we may be of further assistance, please advise us.

Sincerely yours,
FRANK L. DELL'ACQUA
By THOMAS W. STOUT
Thomas W. Stout
*Attorney*